

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL J. & JILL D. THORNES,

Plaintiff,

V.

IMB LENDER BUSINESS PROCESS SERVICES, INC. and FANNIE MAE,

Defendant.

CASE NO. C10-1716MJP

ORDER ON DEFENDANTS'
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED

This comes before the Court on Defendants' Motion to Dismiss. Having received and reviewed

1. Defendants' Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted (Dkt. No. 16.);
2. Plaintiffs' Amended Pleadings (Dkt. No. 12.);
3. Plaintiffs' Response to Defendants' Motion to Dismiss (Dkt. No. 18.);
4. Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (Dkt. No. 19.);

1 and all related declarations and exhibits, the Court GRANTS Defendants' Motion to Dismiss
 2 Plaintiffs' claim with Prejudice.

3 **Background**

4 On October 22, 2010, Plaintiffs Michael and Jill Thornes ("Plaintiffs") filed a petition
 5 alleging state and federal claims against IBM Lender Business Process Services, Inc. and Fannie
 6 Mae ("Defendants"). Specifically, Plaintiffs claim violations of the Real Estate Settlement
 7 Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., violations of the Truth in Lending Act
 8 ("TILA"), 15 U.S.C. § 1601 et seq., violations of the Washington Consumer Protection Act
 9 ("CPA"), RCW 19.86.010 et seq., breach of implied covenant of good faith and fair dealing,
 10 breach of fiduciary duty, negligence, negligence per se, fraud, fraud by nondisclosure, and
 11 intentional infliction of emotional distress. Plaintiffs also seek quiet title to their residence.

12 In conjunction with their October petition, Plaintiffs filed motions for a temporary
 13 restraining order ("TRO") and a preliminary injunction to enjoin the foreclosure sale of their
 14 residence. (Dkt. Nos. 2 and 3.) This Court denied both motions. (Dkt. Nos. 9 and 14.)

15 In their initial complaint, Plaintiffs focused on the culpability of banks and mortgage
 16 companies generally and failed to allege any facts directly relating to Plaintiffs' own loan
 17 experience. (Dkt. No. 1.) After the Court denied the motion for a TRO, Plaintiffs amended their
 18 complaint to include some facts specific to their experience. (Dkt. No. 12.) The amended
 19 complaint alleges improper conduct by Plaintiffs' lender, appraiser, broker, and others, but still
 20 makes no specific allegations against Defendants.

21 Defendants move for dismissal with prejudice. In response, Plaintiffs ask the Court to
 22 deny Defendants' motion and impose sanctions against Defendants for a frivolous motion to
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1 dismiss. In the alternative, Plaintiffs ask the Court to treat Defendants' request as a motion for a
 2 more definite statement and grant Plaintiffs leave to amend.

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4 **Discussion**

5 The Court takes most of Plaintiffs' allegations of material fact as true for the purposes of
 6 the 12(b)(6) motion. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).
 7 "However, conclusory allegations of law and unwarranted inferences are not sufficient to defeat
 8 a motion to dismiss." Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). Additionally, "[t]he
 9 Court need not ... accept as true allegations that contradict matters properly subject to judicial
 10 notice or by exhibit." Sprewell, 266 F.3d at 988.

11 Plaintiffs allege Defendants conspired with lenders, appraisers, underwriters, and others
 12 to induce Plaintiffs to accept a bad loan and buy an overvalued house. Plaintiffs base
 13 Defendants' liability solely on this alleged conspiracy. Plaintiffs' claim fails because (1) they do
 14 not support their allegations of conspiracy with sufficient facts, and (2) the individual claims fail
 15 on the merits. As a result, the Court grants Defendants' motion to dismiss.

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17 **A. Civil Conspiracy**

18 Plaintiffs argue Defendants are liable because they "acted as agents, servants, and/or
 19 employees of the remaining Lenders" and "together, in a 'conspiratorial nature', undertook the
 20 misdeeds" that form the basis of the suit. (Am. Compl. at 6.) However, Plaintiffs fail to allege
 21 any action by Defendants that would demonstrate their agreement to participate in such a
 22 conspiracy.

23 A civil conspiracy involves "a combination of two or more persons to commit a criminal
 24 or unlawful act, or to commit a lawful act by criminal or unlawful means." Harrington v.

1 Richeson, 40 Wn.2d 557, 573 (1952). Although a conspiracy can be shown by circumstantial
 2 evidence, the evidence “must be inconsistent with a lawful or honest purpose and reasonably
 3 consistent only with [the] existence of the conspiracy.” Corbit v. J. I. Case Co., 70 Wn.2d 522,
 4 529 (1967). “A properly plead conspiracy ‘must set forth with particularity the facts and
 5 circumstances constituting the alleged conspiracy.’” Swartz v. KPMG, LLC, 401 F. Supp. 2d
 6 1146, 1157 (W.D. Wash. 2004), aff'd in part, rev'd in part sub nom. Swartz v. KPMG LLP, 476
 7 F.3d 756 (9th Cir. 2007) (quoting Heying v. Simonaitis, 466 N.E.2d 1137, 1142 (Ill. App. Ct.
 8 1984)).

9 Plaintiffs rely on Greenberg v. Sala, 822 F.2d 882, 886 (9th Cir. 1987), and argue that
 10 “averments of agency are not required in a complaint.” (Pl. Resp. Br. at 3.) This reliance is
 11 misplaced. Greenberg pre-dates the more stringent plausibility standard of Bell Atl. Corp. v.
 12 Twombly, 550 U.S. 544 (2007). Because one of the elements of a conspiracy is an agreement to
 13 conspire, Plaintiffs must show some factual support to make it plausible that Defendants entered
 14 into the agreement. Twombly requires a sufficiently pled claim of conspiracy to contain
 15 “enough factual matter … to suggest that an agreement was made.” Id. at 556. Plaintiffs allege
 16 no acts or conduct by Defendants suggesting a conspiracy is plausible. Because conspiracy is
 17 Plaintiffs’ only theory of Defendants’ liability, the substantive claims fail.

18 **B. Merits**

19 1. Breach of Good Faith

20 The implied duty of good faith in every contract applies “to the performance of specific
 21 contract obligations.” Johnson v. Yousoofian, 84 Wn. App. 755, 762 (1996). Although
 22 Plaintiffs allege they “entered into an express contract with Defendants[,]” (Am. Compl. at 2),
 23 Plaintiffs attach documentation that shows Defendants were not parties to the contract. (Am.
 24

1 Compl., Ex. A & B.) Additionally, Plaintiffs elaborate on the contract formation, listing a
 2 broker, lender, appraiser, underwriter, and escrow company but do not name Defendants as
 3 taking any part in the contract formation.

4 Because Defendants are not parties to the contract, they do not owe a duty of good faith,
 5 and the Court dismisses the breach of contract claim.

6 2. Breach of Fiduciary Duty

7 A claim for breach of fiduciary duty must allege “(1) existence of a duty owed; (2) breach
 8 of that duty; (3) resulting injury; and (4) that the claimed breach was the proximate cause of the
 9 injury.” Micro Enhancement Int’l v. Coopers & Lybrand, Inc., 110 Wn. App. 412, 432 (2002).
 10 A fiduciary relationship does not arise simply because a plaintiff puts his or her trust in another
 11 party. “There must be additional circumstances, or a relationship that induce the trusting party to
 12 relax the care and vigilance which he would ordinarily exercise for his own protection.” Moon
 13 v. Phipps, 67 Wn.2d 948, 954 (1966).

14 Plaintiffs allege a fiduciary relationship existed with lenders, appraisers, and underwriters
 15 but have not alleged Defendants’ conduct either created a relationship or induced the trust of
 16 Plaintiffs. The Court dismisses the breach of fiduciary duty claim.

17 3. Negligence/Negligence Per Se

18 A claim for negligence must establish duty, breach, proximate causation and damages.
 19 Gall v. McDonald Indus., 84 W. App. 194, 202 (1996).

20 Here, Plaintiffs allege Defendants owed a general duty of care “particularly concerning
 21 their duty to properly perform due diligence as to the loans and related transactional issues” and
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1 “under TILA, [the Home Owners Equal Protection Act]¹, RESPA … to provide proper
 2 disclosures concerning the terms and conditions of the loans they marketed[.]” (Am. Compl. at
 3 18.) Plaintiffs’ allegations fail to state a claim because they do not establish Defendants owed a
 4 duty to Plaintiffs. Additionally, Plaintiffs fail to allege any conduct by Defendants that would
 5 constitute a breach of that duty. The Court dismisses the negligence claims.

6 4. Fraud/Fraud by non-disclosure

7 Claims of fraud must be pled with particularity. Fed.R.Civ.P. 9(b). The Ninth Circuit
 8 requires the pleading to include “the time, place, and specific content of the false representations
 9 as well as the identities of the parties to the misrepresentation.” Schreiber Distrib. Co. v. Serv-
 10 Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986). In Washington fraud consists of
 11 nine elements:

12 (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's
 13 knowledge of its falsity; (5) intent of the speaker that it should be acted upon by
 14 the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the
 15 truth of the representation; (8) plaintiff's right to rely upon the representation; and
 16 (9) damages suffered by the plaintiff.

17 Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 205 (2008).

18 While Plaintiffs make broad statements about the mortgage lending industry, Plaintiffs
 19 fail to allege Defendants made any representation, let alone a false representation. As a result,
 20 none of the elements are met, and the Court dismisses Plaintiffs’ fraud claims.

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 23 ¹ Plaintiffs make no other references to HOEPA except for this quote regarding
 24 Defendants’ alleged duty.

1 5. TILA

2 Plaintiffs allege Defendants violated TILA by failing to disclose information at the
 3 signing of the loan agreement. But Defendants do not appear to have been a party to the loan
 4 agreement and therefore had no obligations to Plaintiffs under TILA.

5 In addition, Plaintiffs' TILA claims are barred by a one-year statute of limitations.
 6 Plaintiffs argue the statute of limitations should be tolled because "Defendants actively
 7 concealed the complete truth from Plaintiffs[.]" (Pls. Resp. Br. at 4.) But again, Plaintiffs fail to
 8 either demonstrate Defendants were present at contract formation or allege any facts suggesting
 9 Defendants concealed anything from Plaintiffs. The Court dismisses Plaintiffs' TILA claims.

10 6. Outrage

11 Plaintiffs fail to plead the claim for outrage because they do not identify any extreme or
 12 outrageous conduct by Defendants.

13 The claim of outrage has three elements: "(1) extreme and outrageous conduct, (2)
 14 intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the
 15 part of the plaintiff." Reid v. Pierce County, 136 Wn.2d 195, 202 (1998). Plaintiffs have not
 16 alleged any conduct by Defendants that plausibly supports a finding that Defendants' conduct
 17 was extreme and outrageous. The Court dismisses the outrage claim.

19 7. Washington's Consumer Protection Act

20 The Washington Consumer Protection Act ("CPA") creates a private cause of action for
 21 plaintiffs who are injured by unfair or deceptive business practices. RCW 19.86.090. The CPA
 22 has five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce;

1 (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.”

2 Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986).

3 Plaintiffs fail to identify any act or practice by Defendants that is either unfair or
4 deceptive. The Court dismisses the CPA claim.

5 8. RESPA

6 Plaintiffs allege eighteen separate RESPA violations but fail to identify Defendants as the
7 party responsible for any of the violations. (Am. Compl. at 10.) Accordingly, the Court
8 dismisses Plaintiffs’ RESPA claims.

9 9. Quiet Title

10 Plaintiffs argue they have sufficiently “set forth facts concerning the title interests of the
11 subject property.” (Am. Compl. at 13.) However, Plaintiffs fail to identify any facts supporting
12 a quiet title. Additionally, Plaintiffs’ pleading fails to address Defendants’ claim to the property
13 and only discusses “[a]ny claim the lender has or may have[.]” (*Id.* (emphasis added).) The
14 Court dismisses Plaintiffs’ claim for quiet title.

15 16 **C. Leave to Amend**

17 Plaintiffs alternatively request the Court grant leave to amend. Whether to grant leave to
18 amend is in the discretion of the court, but “refusal to grant leave without any apparent justifying
19 reason is an abuse of discretion.” Foman v. Davis, 371 U.S. 178, 182 (1962). “Valid reasons for
20 denying leave to amend include undue delay, bad faith, prejudice, and futility.” California
21 Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1472 (9th Cir.1987),
22 cert. denied, 484 U.S. 1006 (1988).

1 Here, granting Plaintiffs leave to amend would cause undue delay and prejudice
 2 Defendants. The Court has already granted Plaintiffs leave to amend once, and Plaintiffs failed
 3 to state any valid claims against Defendants. In neither the original or amended complaint have
 4 Plaintiffs alleged any act or conduct on the part of the named defendants. Plaintiffs' claims
 5 relate specifically to the conduct of parties at the time Plaintiffs obtained their home loan.
 6 Defendants were not involved in that process, and Plaintiffs do not allege any facts that plausibly
 7 suggest Defendants conspired with the parties who were involved. Granting leave to amend
 8 would extend the amount of time and resources Defendants would have to devote to this action
 9 when Plaintiffs have not demonstrated any reason why Defendants were named.

10 The Court denies Plaintiffs' motion for leave to amend and dismisses all Plaintiffs'
 11 claims with prejudice.

12 **D. Motion for Sanctions**

13 The Plaintiffs move for sanctions against Defendants "for filing a frivolous pleading [sic]
 14 and for failing to speak with candor to the court[.]" (Pls. Resp. Br. at 2.) The Court's decision to
 15 grant Defendants' motion demonstrates that it is not frivolous, and Plaintiff's motion for
 16 sanctions is denied.

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 18 **Conclusion**

19 The Court finds that Plaintiffs have failed to state a claim upon which relief can be
 20 granted and GRANTS Defendants' motion to dismiss. Plaintiffs have alleged Defendants
 21 conspired with other unnamed parties to defraud Plaintiffs but have provided no specific
 22 allegation that Defendants acted in a conspiratorial manner. Plaintiffs have already amended
 23 their complaint once without correcting the deficiencies as to Defendants. Granting Plaintiffs
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1 leave to amend again would be prejudicial to Defendants and create undue delay. The Court
2 DENIES Plaintiffs' motion for leave to amend. Finding Defendants' motion meritorious, the
3 Court DENIES Plaintiffs' motion for sanctions against Defendants.

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5 The clerk is ordered to provide copies of this order to all counsel.

6 Dated: February 15, 2011.

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10 Marsha J. Pechman
United States District Judge

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